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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DOES 1 – 4,

Case No. 2:09-cv-01083 KJD-PAL

Plaintiffs,

MOTION TO UNSEAL ALL SEALED  
DOCUMENTS AND, IN THE  
ALTERNATIVE, FOR ACCESS TO  
SEALED *EX PARTE* DOCUMENTS

vs.  
United States Attorneys Office, District of  
Nevada,

Defendant.

**MOTION TO UNSEAL ALL SEALED DOCUMENTS AND, IN THE ALTERNATIVE,**

**FOR ACCESS TO SEALED *EX PARTE* DOCUMENTS**

Come now Plaintiffs, by and through their attorneys of record, and file this Motion to Unseal All Documents, or in the Alternative for Access to All Sealed *Ex Parte* Documents filed by Defendant, the U.S. government. This motion is based on the attached Memorandum of Points and Authorities, all pleadings on file in this case, and any such argument as may be granted by the Court.

**I. INTRODUCTION**

The DOES publicly commented on a newspaper article about a high profile tax case. In response, the government – *the very same prosecutor criticized by the DOES and other*

1 *commenters* – then issued subpoenas designed to reveal the DOES’ identities, along with all  
2 those of all other commenters. Ostensibly, the subpoenas were also designed to seek  
3 prosecution of the commenters. To prevent this from happening, the DOES initiated this legal  
4 action. The DOES also sought recusal of the assigned judge due to concerns about the public  
5 appearance of impartiality. Rather than litigate this case fairly and in the light of day, the  
6 government is acting in total secret in this case, like the Star Chamber of 1600’s England, by  
7 attempting to keep all its legal filings and communications with the court out of view, even  
8 from opposing counsel.

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10 Fundamental to both American democracy and fair play are the requirements that the  
11 public be able to observe and have access to court proceedings, and that the opposing party  
12 have equal access to the court and the ability to respond to legal filings.<sup>1</sup> The government has  
13 filed numerous sealed and *ex parte* documents despite the fact that there is no rule or court  
14 order allowing them to do so. Meanwhile, the DOES, who acted as quickly as they could to  
15 protect their rights, have not received any rulings from the court and are hamstrung from  
16 protecting themselves. And the government, while it communicates in secret with the court, is  
17 taking the position that this case should just be summarily dismissed as moot. In other words,  
18 the government is asserting that the DOES should have no right or ability to challenge the  
19 subpoenas it sought, and that the public has no business monitoring challenges to actions by its  
20 own government. This is true even though these filings likely deal with a spate of legal issues  
21 – for instance, mootness, standing, and recusal – that in **no way** threaten grand jury secrecy,  
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26 <sup>1</sup> See e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978) (discussing  
27 public’s right to copy and inspect judicial proceedings and records in order to keep a “watchful  
28 eye” on public agencies); *Chernekoff v. United States*, 219 F.2d 721, 723 (9th Cir. 1955)  
essential to a fair hearing is the ability to have an opportunity to know of adverse evidence and  
to be heard concerning its truth, relevancy and significance).

1 and that fall squarely into the longstanding and fundamental truism that legal documents are  
2 public.

3 Not only should the DOES be given a fair and open avenue to seek recourse from the  
4 courts to protect the fundamental First Amendment rights at stake, the public should be able to  
5 know how its government is conducting itself in this matter. This case raises a number of  
6 important questions about government power and legal process: (1) whether the United States  
7 Attorney's Office abused its grand jury subpoena power by issuing subpoenas to obtain  
8 information protected by the First Amendment; (2) the propriety of a prosecutor subpoenaing  
9 identifying information about his critics and impliedly threatening prosecution of his critics; (3)  
10 the potential impact of such action on a current trial; and (4) when a judge should be recused.  
11 This case must be litigated fairly and in the light of day, and the public interest in open court  
12 proceedings, present in all court proceedings, is especially heightened given the important  
13 questions raised. The significant press coverage and public comment that the subpoenas have  
14 sparked highlights the public's keen interest in this matter as well as the underlying tax case  
15 criticized by the commenters, which arguably could be impacted if the jurors learn that the  
16 government has threatened prosecution of people who do not agree with its position in the case.  
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18 In sum, the stakes are very high.

21 Despite the high stakes, by filing sealed and *ex parte* documents, including at least one  
22 motion to dismiss the entire case, the U.S. Attorney's Office is laboring under the erroneous  
23 position that it should be able to operate in secret, even in a civil case where the allegations are  
24 that it has improperly used its "secret" grand jury powers. If the government is allowed to  
25 exclude not only the public but the very people who are challenging them from obtaining equal  
26 access to the court and court filings, then the U.S. Attorney's Office would be able to operate  
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1 entirely unchallenged. This result would be repugnant to our entire form of government.  
2 Amazingly, the government has taken the liberty of repeatedly filing sealed and *ex parte*  
3 documents without even first meeting the procedural or legal burdens necessary to take such  
4 drastic measures.

5 There is absolutely no authority that gives the U.S. Attorney's Office the right to  
6 proceed under a total cloak of secrecy in this matter. It runs afoul of two basic principles of our  
7 court system: the adversarial process and open access to court proceedings. It violates the  
8 DOES' due process rights and their ability to protect their fundamental First Amendment  
9 rights. Grand jury secrecy rules are inapplicable to this civil action,<sup>2</sup> and the government has  
10 failed to, and cannot, meet the legal and procedural burdens necessary to file sealed and *ex*  
11 *parte* motions in a civil case. For these reasons, all documents should be unsealed and the  
12 DOES, as well as the public, should have access to them.

13 Accordingly, as detailed below, DOES respectfully request that all documents filed  
14 under seal in this action be unsealed. To date, those documents are docket numbers 5, 7, 8, 15,  
15 and 16. While DOES contend that all documents should be made public, at the very least,  
16 DOES should have access to a sealed copy of the *ex parte* motion to dismiss (Doc. 7) as well as  
17 all other *ex parte* filings (Docs. 5, 8, 15, 16). Thus, if this Court denies the motion to unseal,  
18 DOES respectfully request that they be provided access to the secret filings.

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## 20       **II. PROCEDURAL HISTORY**

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22       Assistant United States Attorney J. Gregory Damm (AUSA Damm) issued a grand jury  
23 subpoena ("First Subpoena") on June 2, 2009 seeking information about each and every public  
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26       <sup>2</sup> Rules concerning grand jury secrecy are codified in the Federal Rules of Criminal Procedure,  
27 specifically in rule 6(e). Conversely, this case is a civil action challenging the constitutionality  
28 of subpoenas; therefore, this case is governed by the Federal Rules of Civil Procedure, in  
which there are no secrecy provisions for grand jury matters.

comment about an article posted on the Las Vegas Review-Journal’s website about a federal  
1 tax trial in which he is serving as a prosecutor, *United States of America v. Kahre et. al.* (2:05-  
2 cr-121-DAE-RJJ) (“Kahre Case”).<sup>3</sup> The article provoked much debate, with many commenters  
3 noting agreement with Mr. Kahre’s position, great dislike of AUSA Damm, and more generally  
4 sharing their political opinions concerning the I.R.S. and the United States monetary system. A  
5 few commenters noted agreement with the government. While many expressed their opinions  
6 in strong terms, not a single comment posted was criminal.<sup>4</sup>

Upon learning of the First Subpoena, DOES 1-3 filed a Motion to Intervene, Motion to  
9 Quash, and Motion for Protective Order (Docs. 2, 3, 4) on June 16, 2009 seeking to protect  
10 their privacy and First Amendment rights. Subsequently, DOES learned that the First  
11 Subpoena was withdrawn and that a Second Subpoena was issued on June 16, 2009, seeking  
12 only identifying information concerning two commenters to the June 17, 2009 Review-Journal  
13 article (the “Second Subpoena”). The Review-Journal supposedly complied with the Second  
14 Subpoena on June 18, 2009. (Doc. 14 at 4:3-4.) On June 22, 2009, DOES 1-3, along with DOE  
15 4, who joined in challenging the subpoenas, filed an Amended Motion to Intervene, Motion to  
16 Quash, and Motion for Protective Order (Docs. 9, 17, 18) addressing the Second Subpoena and  
17 further clarifying that the relief requested with respect to the First Subpoena was not moot just  
18 because the First Subpoena was withdrawn, and that even if both subpoenas had been complied  
19 with, their attempts to quash the subpoenas and obtain a protective order were not mooted.  
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25 <sup>3</sup> Mr. Kahre, the lead defendant, paid people who worked for him in gold and silver coins, and  
26 believes that the I.R.S. should assess taxes based on the face value of the coins rather than their  
27 market value. Joan Whitely, *Employer’s gold, silver payroll standard may bring hard time*, Las  
Vegas Review-Journal, May 26, 2009, <http://www.lvrj.com/news/46074037.html> attached as  
Exhibit 4 to Doc. # 9.

28 <sup>4</sup> See DOES’ Amended Motion to Quash (Doc. 9 at 13: 25 – 22:2.)

1 Instead of filing an opposition to the Motion to Quash, the government filed a motion to  
2 dismiss DOES' motion and to dismiss the case in its entirety. Because the government's  
3 original Motion to Dismiss was filed *ex parte*, the following is the only information that DOES  
4 received concerning the filing:

5 COMES NOW the United States Attorney's Office for the District  
6 of Nevada (the "United States"), and files this Motion (1) to  
7 Dismiss Plaintiffs' Motion to Quash, for Protective Order, and to  
8 Intervene, dated June 16, 2009 (collectively, the "Omnibus  
9 Motion"), and (2) to Dismiss Case No. 2:09-cv-1083-KJD, for the  
10 reasons set forth in this motion, and in the sealed, *ex parte*  
11 memorandum, filed contemporaneously herewith. It is hereby  
12 certified that the above-captioned response is filed in a timely  
13 manner.

14 (Doc. 7.)

15 Neither the original motion nor the amended motion has been ruled on, as of this filing.  
16 This matter was assigned to Judge Dawson on June 17, 2009. On June 22, 2009, DOES filed a  
17 motion to recuse Judge Dawson (Doc. 10). That motion has not been ruled on as, of this filing.

18 On June 22, 2009, the government filed an Amended Motion to Dismiss and an  
19 Opposition to Plaintiffs' Motion to Recuse (Doc. 14). While the Amended Motion to Dismiss  
20 was provided to counsel for DOES, the initial motion (Doc. 7) remains *ex parte*.

21 The government has filed at least four other documents under seal and *ex parte*. To date  
22 those documents are docket numbers 5, 8, 15, and 16. DOES have no access to these  
23 documents and have no knowledge of when they were filed or what information is contained in  
24 them. DOES are unable to respond to these documents or rebut any arguments contained  
25 therein. DOES were given a copy of the Amended Motion to Dismiss (Doc. 14) and a copy of  
26 the Opposition to the Motion to Recuse Judge Dawson, both of which were designated as  
27 "sealed" but there is no way to know if the Opposition to the Motion to Recuse was filed as  
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1 documents 5, 8, 15, or 16. However, even if it were, there are at least three sealed *ex parte*  
2 documents that still remain a complete mystery.

3 **I. ARGUMENT**

4 **A. Given the Issues Raised By this Case, Operating in Secrecy By Filing Multiple  
5 Sealed *Ex Parte* Documents is Inappropriate.**

6 DOES initiated this civil case in order to challenge what they consider to be invalid  
7 subpoenas that violate the First Amendment and constitute prosecutorial abuse of the grand  
8 jury process.<sup>5</sup> AUSA Damm issued his first subpoena seeking personal information from the  
9 Las Vegas Review-Journal (“Review-Journal”) about every person who commented on an  
10 article about an ongoing federal tax trial in which he is serving as a prosecutor.

12 Fearing governmental retribution for their comments, and believing that the subpoena  
13 was merely a “fishing expedition”<sup>6</sup> by AUSA Damm to chill future speech and send a message  
14 to other tax protesters, DOES sought legal help. They filed a motion to intervene and quash the  
15 subpoena in order to protect their First Amendment right to free speech. The Second Subpoena  
16 was issued on June 16, 2009, but the narrower scope of the subpoena did not alleviate the  
17 fundamental constitutional problems underlying the impetus and purpose behind it. DOES filed  
18 Amended Motions to Intervene, Quash, and for a Protective Order and subsequently filed a  
19 Motion to Recuse of Judge Dawson (“Recusal Motion”) based on his connection to the *Kahre*  
20 case and his past negative experiences with tax protesters. In response to DOES’ motions, the  
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<sup>5</sup> As explained in their Amended Motion to Quash (Doc. 9), DOES filed this action because  
26 they believe the issuance of a grand jury subpoena seeking the names of all commenters to the  
27 Review-Journal’s article is unconstitutional and is meant to suppress opposition to their criminal  
prosecution in the *Kahre* case, and potentially chill jurors (Doc. 9 at 11:2-3, 25:21-27:10.)

28 <sup>6</sup> *U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (“grand juries are not licensed to engage  
in arbitrary fishing expeditions”).

1 government has filed several sealed and *ex parte* documents to which only they and the court  
2 have access.

3 Given that questions about governmental power lie at the heart of this matter, and given  
4 the significant public attention this matter has received, it is especially important that the public  
5 have confidence in the proceedings – confidence which can only be gained by public oversight.  
6 Grand jury secrecy rules are inapplicable to this civil action, and the government has failed to,  
7 and cannot, meet the legal and procedural burdens necessary to file sealed ex parte motions in a  
8 civil case. For these reasons, all documents should be unsealed and the DOES, as well as the  
9 public should have access to them.

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11 **B. Grand Jury Secrecy Rules are Inapplicable to This Collateral Civil Action.**

12 The government has not, and cannot, meet the burden of proof necessary to apply grand  
13 jury secrecy rules to any or all of its filed documents in this civil action. The general grand jury  
14 secrecy rules, applicable only in grand jury proceedings, **do not** extend to this collateral civil  
15 litigation concerning the constitutionality of the government's First and Second Subpoenas.  
16 Indeed, the rule regarding grand jury secrecy is limited by its own terms:

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18 A grand juror, an interpreter, a stenographer, an operator of a  
19 recording device, a typist who transcribes recorded testimony, an  
20 attorney for the government ... shall not disclose **matters**  
21 **occurring before a grand jury**... No obligation of secrecy may be  
22 imposed on any person except in accordance with this rule.

23 Fed. R. Crim. P. 6(e)(2) (emphasis added). Rule 6(e)(2) shields only those issues submitted to  
24 a grand jury and it only shields them for purposes such as: (1) to prevent the escape of  
25 prospective indictees; (2) to insure the grand jury of unfettered freedom in its deliberations; (3)  
26 to impede the subornation of perjury and tampering of witnesses by targets of the investigation;  
27 (4) to encourage forthrightness in witnesses without fear of retaliation; and (5) to act as a shield  
28

1 for those who are exonerated by the grand jury. *Proctor & Gamble Co.*, 356 U.S. 677, 681 n. 6  
2 (1958).

3 In other words, the secrecy rule is meant to protect the identities of witnesses or jurors,  
4 the substance of grand jury testimony, the strategy or direction of the investigation, and juror  
5 questions and deliberations. *See U.S. v. Thomas*, 545 F.Supp.2d 1018, 1024-25 (N.D. Cal.  
6 2008); *Fund for Constitutional Gov't v. Nat'l Archives*, 656 F.2d 856, 869 (D.C. Cir. 1981).  
7 Thus, while grand jury investigations themselves are generally secret:

8 Rule 6(e) does not draw a veil of secrecy over all matters occurring  
9 in the world that happened to be investigated by a grand jury...  
10 The touchstone is whether disclosure would tend to reveal some  
11 ***secret aspect*** of the grand jury's investigation of such matters as  
12 the identities of witness or jurors, the substance of testimony, the  
13 strategy or direction of the investigation, the deliberation or  
questions of jurors and the like.

14 *Canning v. US Dep't of Justice*, 919 F. Supp. 451, 455 (D.C. Cir. 1994)(emphasis  
15 added).

16 Therefore, unless the government's sealed *ex parte* documents contain the identities of  
17 witness or jurors, the substance of testimony, or the deliberation or questions of jurors – which  
18 are highly unlikely to be relevant – sealed *ex parte* documents are not permissible. The only  
19 possible excuse the government could use to justify its sealed *ex parte* filings is that it wants to  
20 protect the strategy and or direction of the government's investigation of DOES. However,  
21 such an excuse would be mere pretext. In a civil action challenging the constitutionality of the  
22 government's abuse of the grand jury process, it is hard to imagine why the government would  
23 need to include this information in a motion to dismiss DOES' constitutional challenge. The  
24 mere fact that a grand jury investigation is underway, for what purpose, and what information  
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1 the grand jury has collected is certainly no secret<sup>7</sup> and does not warrant sealed *ex parte* filings.  
2 Given the fact that the government issued subpoenas to get the identities of DOES and other  
3 commenters, it is hard to imagine what secret information it could possibly have. In any case,  
4 any actual “secret” information could be redacted.

5 DOES’ civil challenge is based on the premise that the U.S. attorney’s grand jury  
6 subpoena to the Review-Journal is unconstitutional because their comments were protected  
7 political speech, they committed no crime, and the purpose of the subpoenas is to punish their  
8 speech and suppress future criticism against the U.S. attorneys. The secrecy rule applies only  
9 to materials that will actually reveal some secret aspect of the inner workings of the grand jury.  
10 DOES are not seeking grand jury materials – they are seeking access, for themselves and for  
11 the general public, to sealed *ex parte* documents which the government has filed in *this* case –  
12 not the subpoena case against the Review-Journal.<sup>8</sup> The public knows a grand jury subpoena  
13 was issued, and the identities of witnesses or jurors, the substance of testimony, the strategy or  
14 direction of the investigation, and juror questions and deliberations are all irrelevant to any  
15 argument the government could make to challenge DOES’ standing to challenge the subpoenas,  
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<sup>7</sup> Thomas Mitchell, *Subpoena seeks names -- and lots more -- of Web posters*, Las Vegas Review-Journal, June 7, 2009, available at <http://www.lvrj.com/opinion/47141327.html> attached as Exhibit 2 to Doc. 9; Joan Whitely, *Review-Journal resists subpoena for names of readers who posted views*, Las Vegas Review-Journal, June 16, 2009, available at <http://www.lvrj.com/news/48145032.html>; *U.S. prosecutors narrow subpoena*, Las Vegas Review-Journal, June 17, 2009, available at <http://www.lvrj.com/news/48240147.html>; Joan Whitely, *TAX CASE: Prosecutors seek to stop ACLU probe*, Las Vegas Review-Journal, June 25, 2009, available at <http://www.lvrj.com/news/49081181.html>.

<sup>8</sup> The ACLU of Nevada is not representing the Las Vegas Review-Journal. It is representing DOES 1-4, who posted comments, and whose identities are being sought by the government. The subpoenas were issued to the Review-Journal and the second subpoena seeks “All information or records regarding the identification of the computers used to make the following posts and the individuals making the following posts to the article entitled “Employer’s Gold, Silver Payroll Standard May Bring Hard Time,” dated May 26.2009...” Second Subpoena attached as Exhibit 5 to Doc. 9.

1 or to DOES' motion to recuse Judge Dawson. Such information is also unnecessary to rebut  
2 DOES' constitutional arguments or their recusal motion against Judge Dawson, nor is it  
3 necessary or pertinent to the government's opposition to DOES' Motions to Quash, to  
4 Intervene, and for a Protective Order. Thus, any attempt by the government to use the secrecy  
5 rules as an excuse to file sealed *ex parte* documents is merely a pretext to gain an unfair  
6 advantage over DOES by pretending to need the protection of grand jury secrecy rules – rules  
7 which are inapplicable in this collateral civil action.

8  
9 The actual arguments at hand – for example, what the scope of the First Amendment is  
10 under the facts – are not imaginably protected and must be made public. In sum, grand jury  
11 secrecy rules do not apply in this case, because this is a civil action challenging the  
12 constitutionality of the government's actions. This matter is a collateral matter to the  
13 government's separate grand jury proceeding,<sup>9</sup> and the government cannot, and has not even  
14 attempted to, set forth any proof that grand jury secrecy rules apply. This case is a civil matter,  
15 governed under the Federal Rules of Civil Procedure, and the government has not met the legal  
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9 Even if the information sought were not collateral and did pertain directly to a grand jury  
proceeding, it would be proper to unseal it. "A party seeking grand jury materials must show:  
(1) the materials are needed to avoid a possible injustice in another judicial proceeding, (2) the  
need for disclosure is greater than the need for continued secrecy, and (3) the request is  
structured to cover only the material so needed." *In re Grand Jury*, 118 F. 3d 1433, 1437 (10th  
Cir. 1997) (subject of a criminal grand jury investigation sought disclosure of some grand jury  
materials in order to disqualify the judge who was presiding over both the criminal and civil  
prosecution by the government for the same offense. District court granted limited disclosure  
and 10th Circuit reversed because Defendant's request for grand jury material was "general and  
vague" and was more of a fishing expedition and did not outweigh the interest in continued  
secrecy). Indeed, courts are especially likely to unseal information that has already been made  
public. "Some courts hold that information concerning matters occurring before the grand jury  
that has already been made public may not be protected by Rule 6(e)." *Penguin Books USA Inc.*  
*v. Walsh*, 756 F.Supp. 770 (S.D.N.Y. 1991). Here, it would be absurd to hold that any  
information that has already been made public through the numerous articles covering the issues  
needs be kept secret.

1 or procedural burden necessary for filing sealed documents nor for filing *ex parte* documents  
2 and engaging in *ex parte* communications with the Court.

3 **C. All Documents Should be Unsealed Because The Government Has Failed To**  
4 **Meet The Burden Of Proof Necessary to File Sealed Documents.**

5 This case is a civil matter challenging the constitutionality of a subpoena: it is not a  
6 challenge to a grand jury proceeding, thus the grand jury secrecy rules are inapplicable. As  
7 explained below, the government has failed to satisfy the necessary legal and procedural  
8 burdens necessary for filing sealed documents in either a civil or grand jury matter.

9  
10 1. The Government has Failed to Meet the Burden Necessary for Sealing  
11 Documents, and Justice Mandates that this Matter Be Litigated in the Light of  
Day.

12 The Supreme Court has recognized a common law right to inspect and copy public  
13 records and documents, including judicial records and documents. *Nixon v. Warner*  
14 *Communications, Inc.*, 435 U.S. 589, 598-99 (1978). “It is well-settled that there exists, in both  
15 criminal and civil cases, a common law public right of access to judicial proceedings and  
16 records.” *Goldstein v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001). “In general, the common  
17 law right attaches to any document that is considered a ‘judicial record,’ which depends on  
18 whether the document has been filed with the court....” *United States v. Wecht*, 484 F.3d 194,  
19 208 (3d Cir. 2007); *See also Republic of the Philippines v. Westinghouse Electric Corp*, 949  
20 F.2d 653, 660 (3d Cir. 1991) (citing earlier cases and history of common law right). The  
21 Supreme Court has also recognized a limited First Amendment right of access to judicial  
22 proceedings in criminal cases. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-  
23 78 (1980)(“...in guaranteeing freedoms such as those of speech and press, the First  
24 Amendment can be read as protecting the right of everyone to attend trials so as to give  
25 meaning to those explicit guarantees.”)

1 Accordingly, the federal courts of appeal, especially the Ninth Circuit, have recognized  
2 a “strong presumption” in favor of access to court documents, holding that only “compelling  
3 reasons” justify denying access to information in the case file. *Foltz v. State Farm Mut. Auto.*  
4 *Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)(“In this circuit, we start with a strong  
5 presumption in favor of access to court records.”); *United States v. Beckham*, 789 F.2d 401, 413  
6 (6th Cir. 1986) (trial court “must set forth substantial reasons for denying” access to its records  
7 and mere articulation of rational justifications will not suffice.); *F.T.C. v. Standard Financial*  
8 *Management Corp.*, 830 F.2d 404, 408-10 (1st Cir. 1987) (the burden of overcoming the  
9 presumption of open judicial records is on the party seeking to maintain the court records in  
10 camera); *Leucadia v. Applied Extrusion Technologies*, 998 F.2d 157, 165 (3d Cir. 1993)(“The  
11 burden is on the party who seeks to overcome the presumption of access to show that the  
12 interest in secrecy outweighs the presumption.”)

15 In the Ninth Circuit, before a party can file sealed documents, it must petition the court  
16 for a protective order and must demonstrate “compelling reasons” to protect the document from  
17 public disclosure. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.  
18 2006). Unless a court record is one “traditionally kept secret,” there is a “strong presumption in  
19 favor of access”. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995)

21 The Ninth Circuit has identified two categories of documents that are “traditionally kept  
22 secret,” and they are: (1) grand jury transcripts; and (2) warrant materials in the midst of a pre-  
23 indictment investigation. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir.  
24 1989). For all other documents, the party seeking to seal documents bears the burden of  
25 proving that compelling reasons – not simply “good cause” - exists to warrant sealing the  
26 documents. *Kamakana*, 447 F.3d at 1180, n.4 (a “good cause” showing will suffice to seal  
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1 documents produced in discovery, but “compelling reasons” are required to keep under seal  
2 dispositive motions and attachments. A “good cause” showing will not, without more, satisfy a  
3 “compelling reasons” test.)

4 Thus, a party, such as the government, who wants to seal motions or other filings bears  
5 the burden of overcoming this strong presumption of public access by meeting the “compelling  
6 reasons” standard. The party seeking closure must articulate “compelling reasons” supported  
7 by specific factual findings that outweigh the general history of access and the public interest in  
8 the judicial process. *Kamakana*, 447 F.3d at 1178-79.

9 In turn, the court must conscientiously balance the competing interests of the public  
10 and the party who seeks to keep certain judicial records secret. *Hagestad*, 49 F.3d at 1434.  
11 “The factors relevant to a determination of whether the strong presumption of access is  
12 overcome include the ‘public interest in understanding the judicial process and whether  
13 disclosure of the material could result in improper use of the material for scandalous or libelous  
14 purposes or infringement upon trade secrets.’” *Hagestad*, 49 F.3d at 1134 (citing *EEOC v.*  
15 *Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990) After taking all relevant factors into  
16 consideration, the district court must base its decision on a compelling reason and articulate the  
17 factual basis for its ruling, without relying on hypothesis or conjecture. *Id.*

18 After considering these interests, if the court decides to seal certain judicial records, it  
19 must base its decision on “a compelling reason and articulate the factual basis for its ruling,  
20 without relying on hypothesis or conjecture.” *Hagestad*, 49 F.3d at 1434 (vacating district court  
21 order sealing documents because the court failed to articulate any reason in support of its  
22 sealing order) (citing *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1294 (9th  
23 Cir.1986)(reversing district court’s denial of access to evidence in criminal case, finding news  
24

1 organization had common law right of access and reasons asserted by the district court for  
2 closure were inadequate).

3 In general, “compelling reasons” exist to seal a document when that document could  
4 become a vehicle for improper purposes, such as to gratify private spite, promote public  
5 scandal, circulate libelous statements, or release trade secrets. *Kamakana*, 447 F.3d at 1179  
6 (“The mere fact that the production of records may lead to a litigant’s embarrassment,  
7 incrimination, or exposure to further litigation will not, without more, compel the court to seal  
8 its records.”)(citing to *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir.  
9 2003)).

10 Furthermore, the court must make a finding of “compelling reasons” for *each and every*  
11 document filed under seal. *Foltz*, 331 F.3d at 1130. In *Foltz*, the district court issued a blanket  
12 protective order, forbidding both parties to disclose any information produced in discovery  
13 absent permission from the other party or from the district court. *Id.* at 1131. Although some  
14 documents met the “good cause” standard of Rule 26(c) because they contained trade secrets,  
15 financial information, and confidential information about third parties, the Ninth Circuit  
16 overruled the blanket protective order because the district court never required the filing party  
17 to show that specific discovery documents contained such information. The party seeking  
18 closure had “not asserted, much less shown, specific harm or prejudice that it expects will arise  
19 from disclosure of any particular documents...” and there was “no evidence that [the district  
20 court] ever made such a finding.” *Id.* at 1131. Even when there is an umbrella protective order  
21 over a group of documents “the burden of justifying the confidentiality of each and every  
22 document sought to be covered by a protective order remains on the party seeking the  
23 protective order.” *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)(stating  
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1 that a blanket protective order for discoverable documents under rule 26(c), still put the burden  
2 of showing “good cause” for each and every document on the moving party. Only the burden of  
3 raising the issue with respect to certain documents would shift to the other party.)

4 In the instant case, there is no evidence that the Government ever filed a motion for a  
5 protective order to seal its filing or put forth any effort to meet the burden of proof necessary to  
6 seal their documents. Furthermore, there is no compelling reason to believe, based on the  
7 public facts surrounding this case, that any documents filed by the government could be used  
8 for improper purposes.

9  
10 In this civil action, the government is defending itself against a constitutional challenge  
11 to its grand jury subpoena and a recusal motion against Judge Dawson. It is impossible to  
12 image how an argument proving constitutionality of an AUSA’s actions or impartiality of a  
13 federal judge could be used to “gratify private spite, promote public scandal, circulate libelous  
14 statements, or release trade secrets.” *Kamakana*, 447 F.3d at 1179. Here, the interest in  
15 openness is especially heightened due to the subject matter of the case and the fact that the  
16 DOES have sought recusal. The public has a right to know how the government has been using  
17 its grand jury subpoena power and how the government is defending itself against a  
18 constitutional challenge based on its use of the secretive grand jury process. It also has a right  
19 to monitor recusal issues and the conduct of the court.

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21  
22 Merely arguing that this case is tangentially related to a grand jury matter is faulty logic.  
23 If there was an absolute rule mandating that anything concerning grand jury proceeding be  
24 cloaked in secrecy, it would be impossible to challenge the ability of prosecutors to utilize the  
25 powers of the grand jury, which would be a nonsensical result given that we live in a  
26 democracy, and given that case law makes clear that U.S. Attorneys do not have absolute  
27  
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1 power with respect to grand jury subpoenas. Thankfully, the Ninth Circuit has designated only  
2 grand jury transcripts and pre-indictment warrant materials as documents which are  
3 “traditionally kept secret,” and immune from the “strong presumption in favor of access”. *See*  
4 *Times Mirror Co.*, 873 F.2d at 1219.

5 The government has not offered any “compelling reasons” proving that secrecy  
6 outweighs the public’s or DOES’ right of access or that disclosure of information in the sealed  
7 documents will cause them a clearly defined and serious injury. The government has not met  
8 its burden of showing that the information or arguments in the sealed documents is “the kind of  
9 information that courts will protect” and that “disclosure will work a clearly defined and  
10 serious injury to the party seeking closure.” *Miller v. Indiana Hosp.*, 16 F.3d at 551. Indeed, it  
11 is unknown whether the government has even attempted to justify sealing its documents. If the  
12 government filed a motion or other evidence supporting its need to seal documents, such a  
13 filing was never served on DOES, and DOES have had no opportunity to rebut any arguments  
14 in favor of allowing the government to file sealed documents.

17 Finally, any court ruling in favor of allowing a party to file a sealed document must be  
18 based on articulable facts, not hypothesis or conjecture. *See Hagestad v. Tragesser*, 49 F.3d at  
19 1434. (vacating district court order sealing documents because the court failed to articulate any  
20 reason in support of its sealing order); *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d  
21 1289, 1294 (9th Cir.1986)(reversing district court’s denial of access to evidence in criminal  
22 case, because reasons asserted by the district court for closure were inadequate).

25 If the party seeking to keep documents sealed cannot meet its burden of proof, then the  
26 court may unseal documents *sua sponte* or on motion of any party or third party. *Gambale v.*  
27 *Deutsche Bank AG*, 377 F.3d at 141. Here, the burden of proof was on the government to  
28

1 prove “compelling reasons” for filing sealed documents, and the complete lack of evidence  
2 showing that it even attempted to meet the legal and procedural requirements to file sealed  
3 documents proves that this Court should never have permitted the government to file sealed  
4 documents in the first place and should unseal them now.

5

6 **2. Sealed Documents Would Not Be Appropriate Even If Grand Jury Secrecy**  
**Rules Applied.**

7 Not only can the government not prove that “compelling reasons” exist to seal any and  
8 all document, it cannot even prove that closure would be appropriate if the grand jury secrecy  
9 rules applied. Even if the government were to argue that the grand jury secrecy rules somehow  
10 apply to this collateral civil matter, and that including grand jury information was necessary to  
11 defend itself against this civil challenge, it would still bear the burden of proving that secrecy  
12 was warranted, and such argument would be in vain because the grand jury subpoena, its  
13 purpose, and its targets are already public knowledge.

14

15 Federal rule of Criminal Procedure 6(e)(6) provides:

16

17 Records, orders, and subpoenas relating to grand-jury proceedings  
18 must be kept under seal to the extent and as long as necessary to  
19 prevent the unauthorized disclosure of a matter occurring before a  
grand jury.

20 In keeping with the public’s common law and First Amendment right to access to court records,  
21 rule 6(e)(6) is severely limited both in scope and time. It is limited to “records, orders, and  
22 subpoenas” related to grand jury proceedings, and it applies only for “as long as necessary” to  
23 keep those grand jury matters secret.

24

25 As noted above, this civil case and the grand jury subpoena are already in public eye and  
26 so the need to maintain secrecy is no longer a valid excuse. Case law explicitly recognizes that  
27 even grand jury proceedings themselves can be unsealed when the information is no longer  
28

1 secret. *See, e.g., In re Federal Grand Jury Proceedings 03-01*, 337 F. Supp. 2d 1218, 1220 (D.  
2 Or. 2004) (Finding the government's assertion of grand jury secrecy under Rule 6(e)(6) moot  
3 because much of the proceeding was already in the public record, such as the subject's  
4 identity, the charges against him, the affidavits in support of the search warrant applications  
5 describing the nature and manner of the FBI's surveillance, and some of the court's orders.  
6 Information not already public could still be protected from disclosure.); *Penguin Books USA  
7 Inc. v. Walsh*, 756 F.Supp. 770 (S.D.N.Y. 1991) ("Some courts hold that information concerning  
8 matters occurring before the grand jury that has already been made public may not be protected  
9 by Rule 6(e)").  
10

11 Here, it would be absurd to hold that any information that has already been made public  
12 through the numerous articles covering the issues needs be kept secret. Thanks to the string of  
13 Review-Journal articles, the public knows about both the First and Second Subpoena, what  
14 information was sought and why, and what crimes the government believes were committed by  
15 the DOES. In fact, the only thing the public does not know is the identities of the DOES.  
16

17 Furthermore, the basis for DOES' challenge is legal, not factual. There are no disputed  
18 facts – DOES made certain anonymous comments which fall under the First Amendment  
19 protections for political speech and the government issued a grand jury subpoena to the  
20 newspaper seeking their identity in order to investigate the possibility of criminal charges  
21 against them. DOES challenge to the subpoena is based on the legal argument that their  
22 comments were protected speech and the subpoenas are unconstitutional. Thus, there is no  
23 need for the government to include any "matter occurring before the grand jury." Even if this  
24 Court believed that grand jury secrecy rules were somehow applicable to this civil action, the  
25 government could not apply them in this particular case because the issue of secrecy is now  
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1 moot and because there is no need to divulge any secret matter in order to defend against a  
2 constitutional challenge or a recusal motion.

3. All Documents Must Be Unsealed.

4 As proven above, the grand jury secrecy rules are inapplicable, and the government  
5 cannot meet its burden of proof to show that “compelling reasons” exist that would permit this  
6 Court to issue a protective order allowing the government to file at least five documents under  
7 seal, with several of those being *ex parte* filings. There is no evidence that the government  
8 even filed a motion for a protective order to allow them to file sealed documents. Although it  
9 is possible to file an *ex parte* motion for a protective order, an *ex parte* motion would also be  
10 highly inappropriate, as discussed below, because it would not provide DOES the opportunity  
11 to rebut the government’s assertions of secrecy.

14 The burden to justify sealing a document is on the party seeking its sealing. *Kamakana*,  
15 447 F.3d at 1178-79. If the party seeking to keep documents sealed cannot meet its burden of  
16 proof, then the court may unseal documents *sua sponte* or on motion of any party or third party.  
17 *Gambale v. Deutsche Bank AG*, 377 F.3d at 141. DOES respectfully request that this Court  
18 unseal all documents filed by the government.

20 **D. *Ex parte* Filings are Extremely Inappropriate and The Government Cannot  
21 Meet The Necessary Legal Standard For Filing *Ex Parte* Documents.**

22 Even more egregious than filing sealed documents to which the public has no access, is  
23 filing *ex parte* documents, to which the *other party* has no access. By filing the documents  
24 both *ex parte* and under seal, the government is ensuring that it can operate under total secrecy.  
25 To date, the government has filed at least five *ex parte* documents (Docs. 5, 7, 8, 15, 16). *Ex*  
26 *parte* motions are extremely disfavored, and all evidence and argument proves that the  
27

1 government's documents should be unsealed; however, if this Court declines to unseal them,  
2 DOES should at least be provided a copy, in order to address the contents therein.

3 Judges are usually extremely reluctant to act *ex parte* in civil actions, because the  
4 nonmoving party does not have the opportunity to be heard orally or in writing, and there is  
5 always a risk that the filing party may not be presenting all the facts the court needs to know  
6 before making a ruling. *See e.g., In re Intermagnetics America, Inc.* 101 B.R. 191, 192–193  
7 (C.D. CA 1989). For obvious reasons of adversarial fairness, *ex parte* communications  
8 between judge and litigant are strongly disfavored. They are tolerated of necessity, however,  
9 where related to non-merits issues, for administrative matters, and in emergency circumstances.  
10 *In re School Asbestos Litigation*, 977 F.2d 764, 789 (3d Cir. 1992)(citing to *United States v.*  
11 *Thompson*, 827 F.2d 1254, 1258-59 (9th Cir.1987)). As with sealed documents, the burden is  
12 on the party wishing to file *ex parte* motions and documents – in this case, the government – to  
13 prove that such an extremely disfavored action is absolutely necessary.

14

15

16 1. This Case Involves A Civil Constitutional Challenge To The Government's  
17 Issuance of a Grand Jury Subpoena; therefore, the Federal Rules of Civil  
18 Procedure Apply to All Filings.

19 Non-grand jury proceedings, such as the present action are governed by the Federal  
20 Rules of Civil Procedure and the Local Rules of Civil Procedure. This case is a civil action to  
21 quash an already-publicized grand jury subpoena. The government has filed an *ex parte*  
22 motion to dismiss DOES' civil suit (Doc. 7, as amended Doc. 14) as well as four other sealed  
23 *ex parte* documents, most likely motions or oppositions to motions (Docs. 5, 8, 15, 16). The  
24 local rules of Civil Practice clearly provide that all motions, unless made during a hearing or  
25 trial, shall be in writing, supported by a memorandum of points and authorities, and served on  
26 all other parties. Local Rule 7-2(a).

27

28

1       In general, *ex parte* orders are proper only in limited situations, such as: (1) ministerial  
2       matters affecting only one side and as to which the court does not typically need an adversary  
3       presentation; (2) scheduling matters, such as motions to shorten time for hearing or to regulate  
4       the order of discovery procedures; and (3) emergencies in which the delay caused by notifying  
5       the opposing party of the motion, or action the opposing party may take after learning of the  
6       motion, may itself defeat the purpose of the motion. *See e.g., In re Intermagnetics America,*  
7       Inc. 101 B.R. 191 (C.D. Cal., 1989)(citing cases and discussing use and purpose of various *ex*  
8       *parte* motions).

9  
10      Non-grand jury civil proceedings, such as the present civil action, are also governed by  
11      Local Rule of Civil Procedure 7-5 which states that “all *ex parte* motions, applications or  
12      requests shall contain a statement showing good cause why the matter was submitted to the  
13      court without notice to all.” DOES have no way of knowing if the government filed such a  
14      statement, but if they did, it is highly doubtful that they actually met their burden of showing  
15      good cause.

16  
17      This case involves a constitutional challenge to grand jury subpoena. There can be no  
18      emergency in which the delay caused by notifying the opposing party of the motion would  
19      defeat the purpose of the motion – the Constitutionality of an the government’s action is not  
20      likely to change over night. Furthermore, it is highly unlikely that any action taken by DOES,  
21      after learning of the motion, would defeat the purpose of the motion – the government is  
22      defending itself against accusations of abuse of the grand jury process and issuing an  
23      unconstitutional subpoena. There is no action that DOES could take which would suddenly  
24      make government’s past actions any more unconstitutional than they already are. Finally, the  
25      fact that this Court has yet to rule on any of the motions filed by any party further proves that  
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1 there is no emergency situation requiring *ex parte* action by the government or the court in this  
2 civil case.

3

4 2. The Government has Failed to Meet the Burden Necessary for Filing *Ex*  
*Parte* Documents.

5 The government cannot meet the high burden necessary of showing good cause to file  
6 *ex parte* documents in a civil case. As the Ninth Circuit has explained, “situations where the  
7 court acts with the benefit of only one side’s presentation are uneasy compromises with some  
8 overriding necessity, such as the need to act quickly or to keep *sensitive information* from the  
9 opposing party. Absent such compelling justification, *ex parte* proceedings are an anathema in  
10 our system of justice and, in the context of a criminal trial, may amount to a denial of due  
11 process.” *U.S. v. Thompson*, 827 F.2d 1254, 1258-1259 (9th Cir. 1987)(emphasis  
12 added)(finding that in camera *ex parte* examination of prosecutors motives for dismissing  
13 certain jurors was abuse of discretion).

14 In *Thompson*, federal prosecutors argued that *ex parte* review was necessary because of  
15 the potential for release of confidential information that would prejudice the prosecution’s  
16 ability to conduct its case. *Id.* at 1259. The court acknowledged that such an excuse could  
17 justify *ex parte* proceedings in some situations, but cautioned that such an excuse could not be  
18 considered “in the abstract,” and would only apply on a case-by-case basis. *Id.* Upon  
19 examining the prosecutors’ actual reasons, the court found them to be “mundane” and would in  
20 no way threaten the government’s case strategy. *Id.* *Thompson* lists several exceptions in  
21 which *ex parte* communication might be appropriate: (1) a district judge’s *ex parte* review of  
22 the prosecution’s evidence to determine if it is subject to the Brady rule<sup>10</sup>; (2) a district judge’s  
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28<sup>10</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

1 consideration on whether to reveal to the defense the identity of a government's informant; or  
2 (3) when there is a need to act quickly such as in an application for a temporary restraining  
3 order. *Thompson*, 827 F.2d at 1258-59, n.3. None of these exceptions are applicable to the  
4 instant case.

5 While DOES are not yet facing a criminal trial based on the information obtained  
6 through the grand jury subpoenas, they may someday, and this action is their first attempt to  
7 argue that the government's use of grand jury subpoenas is a violation of their First  
8 Amendment right to Freedom of Expression. Allowing the government the ability to file secret  
9 documents to defend itself against a constitutional challenge puts DOES at a severe  
10 disadvantage because it limits their ability to protect themselves against potential future  
11 criminal prosecution.

12 There is no possible set of facts that would allow the government to file sealed *ex parte*  
13 documents against DOES. The government does not meet any of the exceptions listed in  
14 *Thompson* nor does it need to rely on any facts from the grand jury proceedings or any strategy  
15 arguments to defend itself against a constitutional challenge. At the very minimum, DOES  
16 should have access to documents that the government has filed, in order to adequately address  
17 any arguments or facts stated in those documents. Finally, if the government's subpoena is  
18 constitutionally infirm, it is more efficient for the court to settle that issue now, rather than  
19 waste time indicting and prosecuting anyone based on secretive arguments that will not hold up  
20 to an adversarial challenge later in court.

21 The Ninth Circuit also favors allowing a party to have access to documents to avoid  
22 injustice.

23 The fair hearing essential to meet minimum requirements of any  
24 accepted notion of due process includes the opportunity to know of

1 adverse evidence and to be heard concerning its truth, relevancy  
2 and significance. Otherwise such a hearing is in violation of the  
‘concept of ordered liberty.’

3 *Chernekoff v. United States*, 219 F.2d 721, 723 (9th Cir. 1955). *Chernekoff* is an excellent  
4 example of why the government should not be allowed to make *ex parte* arguments against a  
5 party. Mr. Chernekoff was a conscientious objector who refused induction into the military. *Id.*  
6 at 722. The military claimed to have proof of his lack of religious sincerity and held a hearing.  
7 *Id.* at 723. The government informed him of his right to be present and to introduce evidence  
8 in his own behalf, but did not inform him that he could have a summary of the negative  
9 information in the government’s file, nor did it provide such information. *Id.* at 723. Thus,  
10 when Chernekoff tried introduced evidence at the hearing, “he was like a blind man striking at  
11 an invisible foe.” *Id.* at 724. Had Chernekoff known that the government’s evidence of  
12 religious insincerity was a single conviction for drunkenness and a later one for speeding, he  
13 could have easily disproved the government’s case against him. *Id.* at 724.

14 DOES are in a similar position as Chernekoff. They cannot rebut the arguments  
15 contained in the government’s sealed *ex parte* documents because they do not know what they  
16 are. To make matters worse, the government has not provided good cause to prove why it  
17 needs to keep *sensitive information* from DOES. Without such a showing, the government  
18 cannot file a series a *ex parte* motions. All *ex parte* motions should be made available to  
19 DOES.

20

21

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23 3. Grand Jury Secrecy Rules are Inapplicable To This Civil Action and Cannot  
be Used To File Ex Parte Documents.

24

25 Again, this is a civil case challenging the constitutionality of a subpoena, not a grand  
26 jury case. As noted above, Rule 6(e) of the Federal Rules of Criminal Procedure cannot be  
27 used to draw a “veil of secrecy” over all matters tangentially related to a grand jury proceeding.

*Canning v. US Dep’t of Justice*, 919 F.Supp. at 455 (“Rule 6(e) does not draw a veil of secrecy over all matters occurring in the world that happened to be investigated by a grand jury… The touchstone is whether disclosure would tend to reveal some secret aspect of the grand jury’s investigation…”). The secrecy rule is actually rather limited, especially when it comes to documents filed in court. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. Fed. R. Crim. P. 6(e)(6). As noted above, the grand jury subpoena, and the information it sought, has already been made public.

Furthermore, grand jury secrecy rules would not permit the government in this case to file *ex parte* motions. An attorney for the government may not disclose a “matter occurring before the grand jury;”<sup>11</sup> however this rule does not require or mandate that any and all information concerning a grand jury proceeding must be secret. A district court may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs - of a grand-jury matter in connection with a judicial proceeding. Fed. R. Crim. P. 6(e)(3)(E)(i). This allows this Court to order disclosure of all *ex parte* documents to DOES. There is no reason for the government to be filing multiple *ex parte* documents in this case.

The Ninth Circuit applies the secrecy rule only to materials that will actually reveal some secret aspect of the inner workings of the grand jury and that “Rule 6(e) ‘is intended only to protect against disclosure of what is said or takes place in the grand jury room ... it is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury.’” *U.S. v. Dynavac, Inc.* 6 F.3d 1407, 1411 (9th Cir. 1993)(citing to *U.S. v. Interstate Dress Carriers, Inc.*, 280 F.2d 52,

<sup>11</sup> Fed. R. Crim. P. 6(e)(2).

1 54 (2d Cir. 1960) (finding that disclosure of business records held by a grand jury which were  
2 independently generated and sought for legitimate purposes, would not “seriously compromise  
3 the secrecy of the grand jury’s deliberations.”)<sup>12</sup>

4 The government cannot simply rely of the fact that a subpoena is tangentially related to  
5 this case and use that to justify filing sealed *ex parte* documents. Even the government must  
6 comply with the law. “Rule 6(e) ‘is intended only to protect against disclosure of what is said  
7 or takes place in the grand jury room... .’” *U.S. v. Dynavac, Inc.* 6 F.3d at 1411. In a civil  
8 challenge against the constitutionality of the government’s use and potential abuse of the grand  
9 jury process, there is no possible reason for the government’s defense of its actions to remain  
10 secret.<sup>13</sup>

11 In the instant case, it is unlikely that there is any information that the grand jury has,  
12 and that could be necessary to the subject matter of the government’s filings, that would  
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14 <sup>12</sup> Thus, if a document is sought for its own sake rather than to learn what took place before the  
15 grand jury, and if its disclosure will not compromise the integrity of the grand jury process,  
16 Rule 6(e) does not prohibit its disclosure. *Id.* at 1412. In fact, once those “matters occurring  
17 before the grand jury” are made public, or once they have lost their protected character, they are  
18 no longer protected by the secrecy requirement of rule 6(e). *See In re Federal Grand Jury  
Proceedings 03-01*, 337 F.Supp.2d 1218 (D. Or. 2004).

19 <sup>13</sup> Although not relevant to this civil matter, it is interesting to note that Courts have permitted  
20 *ex parte* motions as part of the balancing act required to properly protect grand jury secrecy, *In  
re Grand Jury*, 472 F.3d 990, 995 (8th Cir. 2005); however, modest breaches of grand jury  
21 secrecy (this is not what our case is about) may well be required when nondisclosure would  
22 defeat fundamental constitutional rights. *United States v. Dinsio*, 468 F.2d 1392, 1394 (9th Cir.  
23 1973); *citing Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). In fact, the Supreme  
24 Court has held that opposing counsel may have the ability to access grand jury witness  
25 testimony as long as there is a showing of need and the need for secrecy is minimal. *Dennis v.  
United States*, 384 U.S. 855, 869, 870, 872 (1966) (“These developments (making grand jury  
26 testimony available to defendants) are entirely consonant with the growing realization that  
27 disclosure, rather than suppression, of relevant materials ordinarily promotes the proper  
28 administration of criminal justice.” [and] “is also reflected in the expanding body of materials,  
judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.”)

1 somehow jeopardize the government's not-so-secret grand jury proceedings against the  
2 anonymous commenters. The government's actions were either constitutional or not – and  
3 there is no matter before the grand jury which could possibly affect the Court's determination  
4 of that fact or that would need to be kept secretive from DOES. Any argument in favor of the  
5 constitutionality of the government's grand jury subpoena would rely on case law and statutes,  
6 not secret facts, and the government's original Motion to Dismiss (Doc. 7) would presumably  
7 be based on procedural arguments. There is no possible basis for keeping such information  
8 secret from either DOES or the public. Revealing, for example, the cases that the government  
9 relies to prove that its actions were constitutional on in no way jeopardizes any legitimate  
10 criminal investigation.<sup>14</sup>

11  
12 Thus even if this Court were to believe that grand jury secrecy rules could theoretically  
13 apply to this case, they would still be inapplicable because of the nature of the legal arguments  
14 and the fact that the entire case has already been in the public eye for so long.

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20<sup>14</sup> Regardless, even if some secret aspect was absolutely necessary for Defendants' Motion to  
21 Dismiss (Doc. 7), or one of the other 4 *ex parte* documents (Docs. 5, 8, 15, 16), the secrecy of  
22 those matters could be maintained without requiring that all aspects of this collateral matter be  
23 conducted in secret between one judge and the U.S. Attorney's Office. For example, any secret  
24 information could be redacted. *See, e.g., In re Federal Grand Jury Proceedings 03-01*, 337 F.  
25 Supp. 2d 1218, 1220 (D. Or. 2004) (Finding the Government's assertion of grand jury secrecy  
26 under Rule 6(e)(6) moot because much of the proceeding was already in the public record,  
27 such as the subject's identity, the charges against him, the affidavits in support of the search  
warrant applications describing the nature and manner of the FBI's surveillance, and some of the  
court's orders. Information not already public could still be protected from disclosure.) Thus,  
even if portions of the government's Motion information of commenters on the Review-  
Journal's website because it does not know to Dismiss truly were covered by grand jury secrecy  
or some other privilege, a proposition with DOES doubt, as noted, such information could be  
redacted from the rest of the pleading.

1                   **IV. CONCLUSION**

2                   As noted above, the party wishing to seal all or part of the judicial record bears the  
3 burden of establishing “compelling reasons” why the material is “the kind of information that  
4 courts will protect” and that “disclosure will work a clearly defined and serious injury to the  
5 party seeking closure.” The government has offered no such proof and given that this case is  
6 only tangentially related to the grand jury process, the government should be held to this high  
7 standard before assistant U.S. attorneys are allowed to hide behind a cloak of secrecy.

8                   Based on the foregoing, the government’s sealed motions must be unsealed or, in the  
9 alternative, DOES must be provided with a copy of all sealed *ex parte* motions so that they may  
10 adequately defend against any unknown arguments or allegations contained in that motion.

11                  DOES are seeking to unseal and gain access to documents filed by the government in a  
12 civil action challenging the government’s abuse of the grand jury process. DOES are not  
13 seeking material or information about the inner workings of the grand jury, nor are they seeking  
14 to discover the government’s strategy behind the subpoenas. They simply want the opportunity  
15 to read and respond to the information which the government has secretly communicated to this  
16 Court in four sealed *ex parte* filings. Without access to these secret documents, DOES will end  
17 up like Chernekoff – “a blind man striking at an invisible foe” – unable to rebut even the  
18 weakest of arguments.

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1 For these reasons, this Court should unseal all sealed documents filed by the  
2 government or at least allow DOES the opportunity to review all sealed and *ex parte*  
3 documents in order to combat any false, irrelevant or misleading information contained therein.

4

5 Respectfully submitted, this 31st day of July, 2009,

6

7 By: /s/  
8 Margaret A. McLetchie  
9 Nevada Bar No. 10931  
10 **ACLU OF NEVADA**  
11 732 S. Sixth Street, Suite 200A  
Las Vegas, NV 89101  
(702) 366-1902  
*Attorneys for DOES 1-4*

**Certificate of Service**

I hereby certify that on the 31st day of July, 2009, I caused to be served a true and correct copy of this MOTION TO UNSEAL ALL SEALED DOCUMENTS AND, IN THE ALTERNATIVE, FOR ACCESS TO SEALED EX PARTE DOCUMENTS by Plaintiffs DOES 1-4 to all of the parties listed below via electronic service using the Courts CM/ECF filing system to:

Peter S. Levitt, Esq.  
333 Las Vegas Blvd. South  
Suite 5000  
Las Vegas, NV 89101  
Peter.s.levitt@usdoj.gov

/s/

Tamika Shauntee

## An Employee of the ACLU of Nevada